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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

**No. 750**

PHILLIPS PIPE LINE COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

MIKE ANTHONY BELUSKO, JR., AND ANNA CATHERINE BELUSKO,
*Respondents.*

## BRIEF FOR PETITIONER IN REPLY TO BRIEF FOR RESPONDENTS.

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## BRIEF FOR PETITIONER IN REPLY TO BRIEF FOR RESPONDENTS.

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner files this brief in reply to the brief for respondents.

### STATEMENT.

The brief for respondents, and the attempt therein to show that the lower courts' opinions constitute proper judicial action, illustrates the uncertainty, confusion and conflict which result from the erroneous concepts implicit in the decisions of the circuit court and district court below.

## REPLY

### 1. Respondents Fail to Show That the Circuit Court Decision Was in Accord With the Controlling Principle of Law.

Respondents contend that the decision of the circuit court is in accord with the applicable decisions of the Supreme Court of Illinois. However, respondents tacitly admit (p. 5, Respondents' Brief) that the controlling principle of law is:

> "Where an easement is claimed under a grant, the language of the entire agreement is to be construed to determine whether it was the intention of the parties that the claimed easement was granted."

It is obvious from a reading of the circuit court's opinion that the circuit court ignored completely a portion of the pertinent language of the instrument in question in determining that the instrument was "too indefinite and uncertain to authorize the claimed right of defendant (petitioner) to lay a second pipe line some twelve years after the original pipe line was constructed."

The pertinent language of the instrument in question was as follows:

> ". . . Grantor does hereby grant unto . . . Grantee . . . the right to lay . . . a pipe line, or pipe lines. . . ."
> "Should more than one pipe line be laid under this grant, at any time, an additional consideration . . . shall be paid for each line so laid after the first line."

The circuit court in making its decision relied solely on the case of *Winslow* v. *City of Vallejo*, 148 Cal. 723, 84 Pac. 191. The circuit court referred to the case as "pertinent" and "persuasive in its reasoning," and was the only authority cited by the court in rendering its opinion. Reference to the *Winslow* case shows that the circuit court

considered only the first above-quoted phrase of the instrument in question and ignored the second quoted phrase altogether.

In the *Winslow* case the California court was construing the language of an instrument whereby there was granted by Winslow to the City of Vallejo a right of way "for any water pipes or mains which may be laid by the City of Vallejo." In holding that after one water pipe had been laid the City could not later lay additional water pipes, the court said:

> "[W]e see nothing in the language of this grant . . . to indicate that it was intended to give the defendant the right to increase from time to time the number of pipes laid."

This language of the *Winslow* case was quoted by the circuit court. Yet, the circuit court ignored the second above-quoted phrase in the instrument under question which clearly indicates that it was intended by the grantor to give the grantee the right to lay additional pipe lines after the first line had been laid.

If the *Winslow* case is "persuasive" in this case, it is not persuasive to a determination that the instrument in question "is too indefinite and uncertain to authorize the claimed right of defendant to lay a second pipe line some twelve years after the original line was constructed." Such case, together with a consideration of *both* phrases in the instrument quoted above, is only persuasive to a determination that under the instrument in question it was intended that more than one pipe line could be laid "under this grant, at any time." The holding of the circuit court leads to the conclusion that the circuit court either failed to apply the correct principle of law as announced by the Supreme Court of Illinois, or failed to read and consider all the language of the instrument which it was called upon to con-

strue. For either reason the writ of certiorari prayed for in this case should be granted so that such error may be corrected.

In addition, Respondent argues (p. 4 Respondent's Brief) that even though the circuit court did not set forth all its reasoning in its opinion, it did by affirming the district court incorporate by implication the reasoning contained in the opinion of the district court. This argument clearly demonstrates Petitioner's position that the circuit court did *not* decide the case in conformance with the controlling principles of law because the district court said in its opinion (Appendix p. 24):

> "Plaintiffs rely upon the *Winslow* case as decisive of the issue here, but that reliance is misplaced. In addition to the granting clause above summarized, the right of way contract contains additional provisions which must be given effect if possible to do so, *Rhomberg* v. *Texas Co.*, 379 Ill. 430; *Smith* v. *Grubb*, 402 Ill. 451, 461-62, upon application of the established principle that a court [illegible] construing a written instrument, must give consideration to the instrument as a whole. *Midwest-Radiant Corp.* v. *Hentze*, 7 Cir., 171 F. 2d 635, 638; *Walker* v. *Illinois C. R. Co.*, 215 Ill. 610, 618.

The district court recognized that the *Winslow* rule was not applicable, and therefore rejected it. The circuit court on the other hand erroneously seized on it as authority for a proposition which was not involved in that case.

## 2. Respondents Fail to Show That the District Court Followed Accepted and Usual Judicial Reasoning and Controlling Principles of Law.

Respondents' argument, commencing on page 6 of their brief, illustrates the district court's strained and erroneous construction of the instrument in question by pointing out that the district court held the instrument in question to be separable into:

(1) a grant of a right of way limited to one line, and
(2) a purported agreement or option respecting future lines.

As indicated above and in petitioner's petition a proper construction of the instrument shows the parties intended to grant a present right to lay additional lines, in the future. Otherwise, what meaning would this language have:

> "Should more than one pipe line be laid under this grant, at any time, an additional consideration . . . shall be paid for each line so laid after the first line."

It is obvious that the parties were not looking toward an agreement or an option whereby the grantee could lay additional lines. On the other hand, it is obvious that the parties contemplated that "more than one pipe line (could) be laid *under this grant*, at any time." This language permits of no other ligitimate construction.

How the district court determined that by such language the parties meant merely that the grantee was given an option to lay additional lines is incomprehensible. But to further compound the error the district court found that the option was not enforceable because the consideration to be paid for laying the subsequent lines was not stated definitely in the instrument. This strained interpretation violates another cardinal rule of construction:

> "A deed susceptible of two or more interpretations, which would be invalid if interpreted one way, will be interpreted so as to render it valid." (See 26 C.J.S. Deeds § 82b, 809 and *Carder* v. *Hughett*, 243 Ill. App. 179.)

In any event, the district court was also in error in determining that there was not contemplated within the instrument a definite consideration to be paid upon the laying of any line subsequent to the first line. In attempting to support the district court's decision on this point the respondents contend that the "consideration must be calculable from the contract alone" (p. 7, Respondents' Brief—"How, then, by looking at the contract alone, can the consideration for an additional line be calculated?"). It is obvious that the respondents and the district court overlooked the principle of law announced in 12 Am. Jur. Contracts § 70, 561, which had been called to their attention:

> "Where the contract appoints the mode for determining the price, and the price is determined according to that mode, the contract becomes perfect and complete in all respects, as if it had originally been fixed in the writing."

There is no rule of law known to petitioner which requires that the consideration must be calculable from the contract alone.

The reasoning of the district court not only as to intent, but also as to consideration, so completely frustrates the intention of the parties as expressed in the instrument and so completely violates all reasonable rules of construction of instruments, that justice requires the granting of the petition for writ of certiorari in this case and reversal of the decisions below.

The courts below were not faced with a complicated problem in this case. To illustrate this it is noted that other

courts have construed instruments similar to the instrument in question and have concluded that where there is a grant of a right of way for pipe lines and an indication in the instrument that the grantee may lay additional pipe lines "at any time," the instrument is properly construed as the grant of an "expansible easement" under which the grantee can lay one pipe line and later come upon the lands and lay a second and subsequent pipe line. See *Babler* v. *Shell Pipe Line Corporation*, 34 F. Supp. 10 (D.C., E.D. Mo.); *Baker* v. *Tennessee Gas Transmission Co.*, 250 S.W. 2d 566 (Tenn.); *Caruthers* v. *Peoples Natural Gas Co.*, 38 A. 2d 713, 155 Pa. Super. 332; *Crawford* v. *Tennessee Gas Transmission Co.*, 250 S.W. 2d 566 (Tenn.); *Caruthers* v. *Transmission Co.*, 250 S.W. 237 (Tex.); *Patterson* v. *Chambers' Power Co.*, 159 P. 568 (Ore.); *Standard Oil Co.* v. *Buchi*, 66 A. 427 (N. J.); *Tennessee Gas Transmission Co.* v. *Bayles*, 74 F. Supp. 285 (D.C., W.D. La.).

In the *Babler* case there was involved an instrument surprisingly similar to the instrument here in question. Pertinent portions of the instrument under consideration in that case were as follows:

> ". . . Grantor, for and in consideration of the sum of Forty-eight & 50/100 Dollars ($48.50), . . . doth hereby grant unto the . . . Grantee, the Right of Way from time to time to lay . . . pipes and pipe lines. . . ."
>
> "Should more than one pipe line be laid under this grant, at any time, the same consideration per lineal rod as that paid for first line, shall be paid for each line so laid after the first line."

In construing the instrument the court said:

> ". . . the easement confers the right to construct additional lines . . . and clearly confers the right to construct additional lines without limit as to number but upon payment of a stipulated amount per lineal foot. To construe the instrument so as to prevent any future

construction or future construction after a certain number of pipe lines were laid would result in a clear abridgment of the rights conferred by the easement."

The instrument in the *Babler* case did not set the number of lineal rods for which the initial consideration of $48.50 was paid, yet the court had no difficulty, and said at page 13, "The easement fixes the compensation to be paid for the right to lay additional lines".

In this case the courts below overlooked the guiding principles announced in the above-cited cases and proceeded to violate applicable and pertinent principles of law to arrive at their decisions. Under these circumstances we urgently pray that this petition for writ of certiorari be granted.

Respectfully submitted.

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